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Judicial Opinion:
Keys to Enhancing the Trial Lawyer's Image in the Eyes of the Jury

By the Honorable Jeffrey T. Miller

After many years of participation in jury trials as a lawyer and judge, I am convinced that professionalism and civility hold as high a place in the jurors' pantheon of hallowed values as the more articulable traditional trial skills such as effective examination technique and the ability to present a compelling argument. It has been my observation that juries perceive these skills practiced at an enhanced level where the trial attorney is professional, civil, and fair to all in the courtroom, including the jurors themselves. The focus of this article is how a trial attorney may enhance his or her image with a jury simply by being professional and appropriately sensitive to jurors.

At the threshold of this piece, it is important to note that it has long been difficult to secure the requisite numbers of jurors in the metropolitan superior and municipal courts of California. Well before the spate of recent sensational high-profile cases where jurors themselves have endured public scrutiny and embarrassment, and even now, metropolitan jury commissions, in order to build sufficient jury pools, were and are having to summon up to ten times, and more, the number of citizens who actually report for jury duty on the summoned date. Think about that for a moment! The vast majority of those summoned for jury duty in our state courts never report for jury duty, either as a result of financial or medical hardship, or exempt status, or through failure to respond to the summons. An additional percentage of those summoned have simply moved and are either outside the jurisdiction or can no longer be reached within the jurisdiction. Another approximately 5% to 10% of those summoned arrange for deferred service at a more convenient time.

The bottom line is this: setting aside the undeniable principle that jury duty is our civic responsibility, we should be grateful to the 10% to 20% to 30% (depending on the jurisdiction) of summoned citizens who dutifully appear, all for the princely sum of $5 per day plus one-way mileage. We must recognize we profoundly disrupt the working and personal lives of jurors and we must accept the unfortunate fact that many of those who do honor this civic duty approach the task with varying degrees of cynicism and anxiety. As lawyers and judges we must be considerate of those who have answered the call. As lawyers and judges we must do what we can to enhance the image of the courts and our profession. We must avoid unnecessary delays during trial, maintain an efficient pace for trial, and always practice civility. The balance of this article will focus on ways trial attorneys may enhance their professionalism and sense of fairness before the jury.

-- Be Fair During Voir Dire --

Credence should be given to the old adage that one seldom gets a second chance to make a first impression. It is during the attorney's participation in jury selection, or voir dire, where the first impression will be created with jurors. In order to enhance that first impression, the trial attorney should make inquiry into any ground rules or procedures the trial judge may have concerning voir dire.

Many judges impose time limits on attorney's participation during voir dire and some may wish to have voir dire conducted from a certain position in the courtroom. Judges also differ as to the number of prospective jurors to be questioned. That number will vary anywhere from 12 to an entire panel of 30 or 40 persons. The point here is that trial counsel should obtain relevant guidelines and limitations from the court so as to reduce the risks of overstepping bounds and possible admonishment from the court in the presence of the jury.

Time limitations, express or implied, are now a fact of life for trial attorneys. There is no longer time to "select" a jury through extended individual examination and indoctrination. With time carefully allotted,

counsel's focus should be upon "de-selecting" prospective jurors who are undesirable from your point of view. Counsel should ask general questions whenever possible rather than individually repeating the same question 12, or 30, or 40 times. Individual follow-up questions should then be focused as circumstances require. In my view, counsel should always avoid undue repetition and overt efforts to indoctrinate. Jurors are generally savvy and quickly see through efforts to manipulate their thinking. Ultimately, a trial attorney who attempts to precondition a juror runs the risk of that juror feeling patronized or treated unfairly.

If trial counsel feels a particular piece of adverse evidence needs to be diffused, usually merely mentioning the evidence, such as a prior felony conviction, or undisputed wrongful conduct, with the question whether a juror will be able to fairly consider that circumstance with all the evidence, will suffice. By contrast, to ask a prospective juror how that evidence might be considered, or whether that evidence might prejudice that prospective juror against your client, is to ask that evidence be prejudged. By asking such a question, the trial attorney risks being perceived as unfair.

Another practice which I would recommend be avoided, because it may be perceived as unfair or unprofessional, is "rehabilitating" a suspect panel member only to later peremptorily challenge that person. All too often I have observed trial counsel go to some length in questioning a panel member who initially seemed predisposed against that attorney's client, through artful examination obtain that person's commitment to be fair and objective, and then challenge that individual. The advantage of having used that person to educate and perhaps impress the remainder of the panel must be balanced against the risk of being perceived as unfair. Other jurors may ask themselves why you have summarily dismissed one of their own after that person demonstrated an open mind as a result of your enlightened voir dire. As a trial attorney, do you want to run that risk?

To enhance your image of fairness in the area of voir dire, always be courteous to all panel members, do not unduly pry into personal matters, and above all, be yourself. If you are comfortable using notes, use them. If you are unable to memorize the names of 20 or 30 panel members, do not try. Lastly, when you are satisfied with the composition of the jury, quickly say so. It serves no purpose to gaze upon prospective jurors in silent appraisal or staged assessment. Jurors are not cattle at auction, and chances are you are not Sir Laurence Olivier.

-- Examine Witnesses Professionally --

Another vital area where trial counsel may demonstrate professionalism is during the examination of witnesses, and, mind you, this is not limited to when you are conducting the examination.

In my view, "mugging the jury" during the examination of a witness is, perhaps, the greatest breach of professionalism a trial attorney can commit. And what do I mean by "mugging the jury"? I'm glad you asked! "Mugging" is a form of inappropriate communication with the jury. It may consist of nonverbal conduct such as facial expressions or physical gestures intended to convey displeasure with a witness' testimony, opposing counsel, or the rulings of the court. Mugging may take the form of shaking or nodding the head, rolling the eyes, or looks of disgust or amusement. It can include derisive laughter, chuckles, snorts, or other sounds. It occurs when a trial attorney turns his or her back on a witness as commentary on an answer or faces the jury while questioning the witness. I have observed it in the form of feigned yawning, excessive rustling of papers or stage whispers between attorney and client.

Mugging is a form of cheating and, I believe, it is perceived as such by juries. At the very least, it is distracting and irritating. A jury is able to assess what is said in the courtroom without being "assisted" by the peevish conduct of counsel. The same can be said of counsel's client, too. "Mugging" by the client can be just as distracting and irritating as such conduct by counsel.

Nothing a trial attorney says or does of any consequence will be missed or overlooked by all jurors. This includes the professional demeanor of counsel. How a trial attorney handles adversity (damaging testimony, adverse rulings) is constantly gauged by the jury. Never let them see you fall from professional grace.

When examining a witness, counsel should always be concerned with the jury's ability to appreciate your efforts. Speak loudly enough so that all may hear you. Never impair any juror's line of vision to the witness

stand while the witness is testifying. Avoid asking questions of a witness (or, for that matter, addressing the jury) while your back is turned to the jury. Set up exhibits so that the jury has the best possible view, consistent with any guidelines of the court. Avoid repetitive examination as well as recasting the answer just given as the next question. I have, on many occasions, seen a jury, through body language and facial expression, register their own protest to questions being repeatedly asked and answered. If videotaped deposition testimony is to be shown, do your utmost to edit the tape to display only that testimony that would have been elicited through a live witness. If you fail to properly edit, you risk inflicting deadly boredom upon the jury. The same can be said of deposition excerpts read to the jury -- choose wisely and use sparingly.

It is important for counsel to constantly assess the jury's level of attention and interest. Does the jury seem attentive? If there are dedicated note-takers on the jury, are you observing them for those times when they have ceased taking notes or do not appear to be particularly attuned to the testimony? If so, thought should be given to new areas of examination. Have you organized your exhibits for easy, orderly access during the witnesses' examination? If not, the flow and momentum of examination will surely be lost.

Only careful thought and dedicated preparation will ensure the effective and efficient examination of witnesses designed to project a professional and confident image to the jury. When that rhythm is created, juries respond.

-- Civility in Argument --

Civility is infectious. Where it has been practiced during the course of a trial, chances are it will be extended to the argument phase. I have never observed a jury react negatively to a civil, professional argument. I have seen jurors wince, nervously shift in their seats, or avert their eyes in embarrassment when an argument is patronizing, shrill, or unfairly hostile to the opposing attorney or party. Some specific risks of argument to be avoided are set forth below.

It is perfectly appropriate to stress with the jury the vital role they play as judges of the facts and you may even acknowledge, in a given case, their task will be difficult and challenging. To venture further, however, to curry favor or become solicitous is dangerous. I have observed counsel commence an argument by telling the jury, "You are chosen people... you were picked because you are fair... you are the most important people in the courtroom..." Such excesses are obsequious and must be avoided by counsel. Besides, everyone in the courtroom, in their own way, believes the destiny of the case rides on their shoulders.

Although modesty and a quietly confident manner always play well to a jury, self-denigration should be avoided. Advising the jury you are "only a mouthpiece for your client," or a "conduit," tarnishes your image and undermines your credibility. Moreover, I have never liked the apologetic approach where counsel asks forgiveness for anything done during the course of the trial which may have offended one or more jurors and declares it should not be held against the client. This tone seems too defensive and asks a jury to do something which is very difficult: separate the merits of a party's case from the manner in which it was presented by counsel.

Personal attacks on counsel, in my view, are not well received by juries. To accuse counsel of being deceptive or dishonest with the jury is to pander to the worst images of our profession while engaging in exactly the stereotyped behavior some jurors anticipated when reporting for jury duty.

Arguments are always enhanced by appropriate social, literary, historical and biblical references. Quotes from Shakespeare, Will Rogers, Yogi Berra, and others may create a poignancy, enliven argument, or inject appropriate humor into the proceedings. Counsel should always take care to be accurate in any use of references or quotes (just in case you have a classical scholar or other well-read types on the jury), and should tailor references or quotes to the jury. For example, likening the burden of proof to a sophisticated analogy of a football team pushing the ball across the 50-yard line may not be too effective where the jury contains ten women, none of whom gave you any reason to believe they follow sports.

Avoid any derogatory references to professional or occupational groups or lifestyles. There is no telling which juror might be offended by such negativity. Profanity, even at the "G" rated level of "damn" or "hell," is never appropriate as a courtroom is generally perceived to be hallowed ground where such utterances have no

place in argument.

Argument is your final opportunity to elevate the image of our profession with a jury. If a case has been tried with civility and integrity, the jury will expect no less from the arguments, and will certainly benefit from your professionalism.

The Honorable Jeffrey T. Miller, a Superior Court judge in San Diego County, is also an advisor to the Litigation Section.

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Russell Leibson
Editor-in-Chief, California Litigation
Law Offices of Russell Leibson
One Market Plaza
Steuart Street Tower, Suite 1600
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The Litigation Section
State Bar of California, 180 Howard Street, San Francisco, CA 94105-1639